

**STATE OF INDIANA  
CIVIL RIGHTS COMMISSION**

**TOM E. BRADY,**  
Complainant,

**vs.**

**DOCKET NO. EMha95040293  
EEOC NO. 24F950250**

**ADVANCED  
TRANSPORTATION  
COMPANY,**  
Respondent.

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND  
ORDER**

On March 1, 2001, Robert D. Lange, Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC"), enter his Proposed Findings Of Fact, Conclusions Of Law, And Order (the proposed decision").

No objections have been filed to ICRC's adoption of the proposed decision.

Having carefully considered the foregoing and being duly advised in the premises, ICRC adopts as its own the findings of fact, conclusions of law, and order proposed by the ALJ in the proposed decision, a copy of which is attached hereto and incorporated herein by reference.

**INDIANA CIVIL RIGHTS COMMISSION**

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**COMMISSIONER**

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**COMMISSIONER**

Dated: 22 March 2002

To be served by first class mail on the following parties:,

Tom E. Brady  
1705 North Shore Drive  
Rome City, IN 46784

Advanced Transportation Company  
c/o Chief Executive Officer  
3227 West Coliseum Boulevard  
Fort Wayne, IN 46808-1005

and to be personally served on the following attorney of record:

Frederick S. Bremer, Staff Attorney  
Indiana Civil Rights Commission  
Attorney for Complainant Tom E. Brady  
Indiana Government Center North  
100 North Senate Avenue, Room N103  
Indianapolis, IN 46204-2255

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CIVIL RIGHTS COMMISSION**

**TOM E. BRADY,**  
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**vs.**

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**PROPOSED FINDINGS OF FACT, CONCLUSIONS OF  
LAW, AND ORDER**

A Hearing was held on November 7, 2002 before the undersigned Administrative Law Judge ("ALJ") for the Indiana Civil Rights Commission ("ICRC"). Complainant, Tom E. Brady ("Brady"), was present and represented by counsel, Frederick S. Bremer, ICRC Staff Counsel. Respondent, Advanced Transportation Company ("Advance"), did not appear, by counsel or otherwise.

Brady testified and also called Bradford Shockney ("Shockney") as a witness. During Shockney's testimony, Complainant's Exhibit 1 ("CX\_\_"), CX2, and CX3 were admitted into evidence.

The ALJ ordered that Brady submit what he suggested that the ALJ propose as findings of fact, conclusions of law, and order on or before December 17, 2001. This deadline was extended, twice, both times at Brady's request. The eventual deadline became January 7, 2002. ORDER GRANTING ENLARGEMENT OF TIME (December 18, 2002), ORDER GRANTING SECOND ENLARGEMENT OF TIME (January 2, 2002).

On January 7, 2002, Brady filed his Tender Of [Proposed] Findings Of Fact, Conclusions Of Law And Order As Proposed By Complainant.

Having carefully considered the evidence (both testimonial and documentary) and the arguments of counsel, and being duly advised in the premises, the ALJ proposes that ICRC enter the following findings of fact, conclusions of law, and order.

## **FINDINGS OF FACT**

1. The issues to be resolved in this case are whether Brady was denied re-employment by Advance because of disability and, if so, what relief should be awarded.
2. Brady is an adult male who has resided, at all material times, in the state of Indiana.
3. Advance was, at all material times, an interstate and intrastate trucking company operating a terminal in Fort Wayne that employed 6 or more persons within the state.
4. Brady worked for Advance from August 17, 1992 until November 9, 1993 as a casual worker subject to being called on an as needed basis from a list of casual employees.
5. Eventually, Brady had the most seniority for purposes of being called from the casual list, and was working 50 hours per week. As a result, Brady quit another job he had held at the time.
6. When Brady worked as a casual for Advance, he worked primarily in 2 capacities. One was driving a truck within a 75 mile range of Fort Wayne to make deliveries and pick up other freight for return trips. At other times, Brady was assigned to load and unload trucks on the dock at the Advance terminal.
7. On the night shift on November 9, 1993, Brady was injured when a co-worker accidentally drove a forklift over his foot.

8. As a result of this accident, Brady's foot was almost smashed, 3 of his toes were broken, and he was hospitalized for 2 days. Brady was forced to use a walking cast most of the time that he was not able to work.
9. While Brady was in the hospital, Cindy Inman ("Inman"), the terminal manager, assured Brady that when he was able to work, Advance would use him and would put him back to work.
10. On or about May 19, 1994, Brady went to Advance and presented a medical release to the terminal manager, known to him only by his first name - Barry. This form (CX2) specified that Brady could return to work on a part time basis (Monday, Wednesday and Friday) for the next 6 weeks and then progress as tolerated. Barry told Brady that he (Barry) would check with the Advance office in Milwaukee to see what would be done about using Brady within the prescribed restrictions.
11. Eventually, Barry told Brady that he (Barry) would have to have a full release with no restrictions.
12. On or about June 30, 1994, Brady presented another medical release to Advance. This release indicated that Brady could return to work with no restrictions. Again, the release was presented to Barry and again Barry told Brady that it would be necessary to check with the Milwaukee office of Advance to find out what to do with Brady.
13. Casual work was available at Advance after Brady became physically able to work again; however, Brady was never called to work as a casual by Advance again even though Brady appeared at Barry's office repeatedly to express his interest in working for Advance.
14. While he was trying to return to work at Advance after receiving his full medical release, Brady learned that a person from Wisconsin had been hired as a full time over the road truck driver. When Brady asked Barry why he had not been hired for that position, Barry said that Brady lacked the qualification of over the road truck driving experience. Brady did have over the road truck driving experience and that fact was noted on his application.

15. Even after Brady's full release to work, he was rated as having a 30% permanent partial impairment. Thus, the condition of his foot, at its post-accident best, is a physical condition constituting a substantial disability. That disability, no later than that full release, was unrelated to Brady's ability to engage in the occupation of casual laborer for Advance.

16. The condition of Brady's foot, at its post-accident best, was a physical impairment that substantially limited the major life activities of walking, performing a manual task, and caring for oneself.

17. At the time that Advance declined to re-employ Brady, Brady had a record, known to Advance of having a physical impairment that substantially limited the major life activities of walking, performing a manual task, and caring for oneself.

18. There is no evidence of a legitimate business reason for Advance's failure to re-employ Brady.

19. On this record, it is more likely than not that Advance failed to re-employ Brady either because of his foot condition or because of his record of a foot condition.

20. When Brady was working for Advance, he earned the union rate of \$15.50 per hour. By the time of Brady's injury, he had, for some time, been averaging 50 hours per week.

21. Had Brady been re-employed on June 30 of 1994, he would have earned a total of \$44,300.00, gross, by the first week of July of 1995. Calculations are shown below:

$$\begin{array}{r} \$15.50/\text{hour} \\ \times 55 \text{ hours per week}^1 \\ \hline \$852.50 \text{ per week} \\ \times 52 \text{ weeks} \\ \hline \$44,300.00 \text{ TOTAL} \end{array}$$

22. During the last half of 1994, Brady earned about \$4,000.00, gross, from self-employment and temporary employment.

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<sup>1</sup> Ten of the 50 hours per week would be paid at time and a half.

23. Brady did not begin to earn the union rate again until July of 1995, when he obtained employment at Mid States. Prior to obtaining that job, Brady earned a total of \$9,833.00, gross, in 1995.

24. Brady thus lost a total of \$30,467.00, gross, as a result of not being re-employed by Advance. This is the difference between what he would have earned and what he did earn until the point where he obtained employment that paid as well as Advance.

25. Brady has also lost the use of the income he would have earned from Advance.

26. Awarding interest is the way to compensate someone for the loss of use of money to which the person was entitled. Calculated as simple interest at the rate of 8%, compounded annually, Brady is entitled to interest, up to the date of the Hearing, in the amount of \$23,264.24, calculated as follows:

<b>1994</b>	\$30,467.00 x .08 x 26/52 (26 weeks)	\$1,218.68
<b>1995</b>	\$31,685.68 x .08	2,534.85
<b>1996</b>	\$34,220.53 x .08	2,737.64
<b>1997</b>	\$36,958.17 x .08	2,956.65
<b>1998</b>	\$39,914.82 x .08	3,193.19
<b>1999</b>	\$43,108.01 x .08	3,448.64
<b>2000</b>	\$46,556.65 x .08	3,724.53
<b>2001</b>	\$50,281.18 x .08 x 44.6/52 (44 3/5 weeks)	<u>3,450.06</u>
<b>TOTAL</b>		\$23,264.24

27. Any Conclusion Of Law that should have been deemed a Finding Of Fact is hereby adopted as such.

## **CONCLUSIONS OF LAW**

1. ICRC has jurisdiction over the subject matter and the parties.
2. Brady and Advance are each a "person" as that term is defined in section 3(a) of the Indiana Civil Rights Law ("the ICRL"), IC 22-9-1-3(a), and section 15 of the Hoosiers with Disabilities Act ("the HDA"), IC 22-9-5-15.

3. Advance is an “employer” as that term is defined in section 3(h) of the ICRL and section 10(a) of the HDA. IC 22-9-1-3(h), IC 22-9-5-10(a).

4. Section 3(l) of the ICRL provides, in material part, as follows:

(l) “Discriminatory practice” means:

(1) the exclusion of a person from equal opportunities because of ... disability ...

...

Every discriminatory practice relating to ... employment ... shall be considered unlawful unless it is specifically exempted by this chapter.

IC 22-9-1-3(l).

5. Section 3(r) of the ICRL provides, in material part, as follows:

(r) “Disabled” or “disability” means the physical or mental condition of a person that constitutes a substantial disability. In reference to employment, under this chapter, “disabled or disability” also means the physical or mental condition of a person that constitutes a substantial disability unrelated to the person’s ability to engage in a particular occupation.

IC 22-9-1-3(r).

6. Brady’s foot condition, at its post-accident best, was a physical impairment constituting a substantial disability unrelated to his ability to engage in the occupation of casual worker at Advance.. Brady was, therefore, “disabled” and had a “disability” as those terms are defined in section 3(r) of the ICRL.

7. Refusal to re-employ an employee because of that employee’s disability excludes the employee from equal opportunities because of disability and is a discriminatory practice under section 3(l) of the ICRL. Because there is no applicable exemption for such a practice, it was unlawful. IC 22-9-1-3(l).

8. Section 6(a) of the HDA provides, in material part, as follows:

(a) ... “disability” means with respect to an individual:

(1) a physical or mental impairment that substantially limits one (1) of the major life activities of the individual;

(2) a record of an impairment described in subdivision (1).

...

IC 22-9-5-6(a).



9. ICRC's regulations interpreting the HDA provide, in material part, as follows:

"Major life activity" means a function, such as the following:

- (1) Caring for oneself.
- (2) Performing a manual task.
- (3) Walking.

...

910 IAC 3-2-9.

10. The condition of Brady's foot, at its post-accident best, was a physical impairment that substantially limited the major life activities of caring for oneself, performing manual tasks, and walking. Thus, that condition was a disability as defined in section 6(a) of the HDA.

11. Cases decided under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.* ("Title VII") are entitled to great weight in construing the ICRL. *Indiana Civil Rights Commission v. Culver Educational Foundation*, 535 N.E.2d 112 (Ind. 1989).

12. Different kinds and combinations of evidence may be used to prove a claim of intentional discrimination, or disparate treatment, as it is commonly called. *Troupe v. May Department Stores*, 20 F.3d 734, 64 FEP Cases 512 (7<sup>th</sup> Cir. 1994).

13. One of those methods, utilized in the absence of direct evidence of discrimination, is the burden shifting method first set out in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 5 FEP Cases 965 (1973).

14. In many cases, this burden shifting method of proof involves 3 stages. Here, though, it is only necessary to address the first 2 stages. In the first stage, complainant must prove by a preponderance of the evidence a *prima facie* case, a burden that is not onerous, *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 25 FEP Cases 113 (1981), and is designed to eliminate the most common reasons for the contested decision. *Moore v. City of Charlotte*, 754 F.2d 1100, 36 FEP Cases 1582 (4<sup>th</sup> Cir. 1985). If complainant meets this burden, a mandatory, but rebuttable, presumption is created that unlawful discrimination

occurred. The burden then shifts to the employer to introduce evidence of at least one legitimate, non-discriminatory reason for the contested decision.

15. Brady met his burden of proving a *prima facie* case by proving that he was disabled, that he sought re-employment at Advance as a casual worker, that he was not re-hired, and that casual work was available at Advance to persons with Brady's qualifications.

16. Advance did not meet its burden to produce evidence of a legitimate, non-discriminatory reason for failing to re-employ Brady.

17. Advance's refusal to re-employ Brady because of disability was an unlawful discriminatory practice under IC 22-9-1-3(l).

18. Advance's refusal to re-employ Brady because of his foot condition was in violation of section 19 of the HDA, which provides, in material part, that

[a] covered entity may not discriminate against a qualified individual with a disability because of the disability of that individual in regard to any of the following:

...  
(2) The hiring ... of employees.

...  
IC 22-9-5-19(2).

19. Section 6(k) of the ICRL governs ICRC's authority upon the finding of an unlawful discriminatory practice and provides that, among its powers and duties, ICRC

... shall state its findings of fact after a hearing and, if the commission finds the person has engaged in an unlawful discriminatory practice, shall cause to be served on this person an order requiring the person to cease and desist from the unlawful discriminatory practice and requiring the person to take further affirmative action as will effectuate the purposes of his chapter, including but not limited to the power:

(A) to restore complainant's losses incurred as a result of discriminatory treatment, as the commission may deem necessary to assure justice .

IC 22-9-1-6(k).

20. Section 6(k) of the ICRL also governs remedies under the HDA. IC 22-9-5-26.

21. Brady has proven out of pocket losses that were the proximate result of the proven unlawful discriminatory practices.
22. The loss of the use of wages is a part of the loss that a discriminatee incurs when the wages are lost. Thus, the awarding of interest to compensate for the loss of the ability of the victim to use the wages wrongfully denied is within the authority of ICRC.
23. Interest should be awarded at an annual rate of 8%, compounded annually. This is the rate provided for in IC 24-4.6-1-103, a statute that is appropriate to consult in the absence of a more specifically applicable statute. *Indiana Insurance Company v. Sentry Insurance Company* 437 N.E.2d 1381 (Ind. App. 1982).
24. The burden of proof on the issue of mitigation of damages is on the wrongdoer. *Colonial Discount Corp. v. Berkhardt* 435 N.E.2d 65 (Ind. App. 1982).
25. Administrative review of this proposed decision may be obtained by the filing of a writing specifying with reasonable particularity each basis for each objection within 15 days after service of this proposed decision. IC 4-21.5-3-29(d).
26. Any Finding of Fact that should have been deemed a Conclusion of Law is hereby adopted as such.

## **ORDER**

1. Advance shall cease and desist from refusing to employ individuals because of disability.

2. Advance shall deliver to ICRC a cashier's check payable to ICRC, as escrow agent for Brady, in the amount of Fifty-Three Thousand Seven Hundred Thirty-One Dollars and Twenty-Four Cents (\$53,731.24), minus deductions required by law and/or agreement. Of this amount, only Thirty Thousand Four Hundred and Sixty-Seven Dollars (\$30,467.00) is subject to deductions.
3. This Order shall remain in effect for 1 year after its effective date.
4. This Order shall take effect immediately after it is approved and signed by a majority of the members of ICRC, unless it is modified by ICRC pursuant to IC 4-21.5-3-31(a), stayed by ICRC under 4-21.5-3-31(b), or stayed by a court of competent jurisdiction.